FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1407

JAMES TRAINOR, et al.,

Appellants,

vs.

JUAN HERNANDEZ, et al.,

Appellees.

REPLY BRIEF FOR APPELLEES MORGAN M. FINLEY AND RICHARD J. ELROD

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REPLY BRIEF FOR APPELLEES MORGAN M. FINLEY AND RICHARD J. ELROD

QUESTIONS PRESENTED

Did Appellees Finley And Elrod Perfect Their Appeal, And May The Supreme Court Review The Action Taken By The Three Judge District Court?

II.

Should Have The Three Judge Court Abstained From Hearing This Case On The Merits?

III.

Do The Statutory Procedures Provided In The Illinois Attachment Act, Ill. Rev. Stat., 1973, Ch. 11, Afford These Plaintiffs Due Process Of Law?

ARGUMENT

APPELLEES FINLEY AND ELROD HAVE PERFECTED THEIR APPEAL TO THE SUPREME COURT AND MAY CHALLENGE THE ACTION TAKEN BY THE THREE JUDGE COURT.

The Three Judge District Court for the Northern District of Illinois, Eastern Division, entered its judgment and final order on December 15, 1975, which judgment basically granted the relief requested by the plaintiffs. The Motion to Stay the Injunction was denied on February 25, 1976. Finley and Elrod timely filed their Notice of Appeal on February 10, 1976.[1] The appeal was perfected when the case was docketed with the Clerk of the Supreme Court. Appellee Hernandez argues that Finley and Elrod have not perfected their appeal and he has moved for dismissal of their appeal.

At the outset it should be noted that the requirements necessary to perfect an appeal are contained in Supreme Court Rule 10(1).[2] There is no doubt that Finley and Elrod timely filed their Notice of Appeal. Co-defendants Trainor and O'Malley acted to docket the case; therefore, these defendants had no cause to do so. However, plaintiff-appellee Hernandez makes much of the fact that Finley and Elrod did not file a separate jurisdictional state-

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1. Not May 10, 1975, as incorrectly stated in their earlier Brief (p. 2).

2. Supreme Court 10(1): An appeal permitted by law to this Court shall be taken by filing notice of appeal, in the form and at the place prescribed by this Rule, and shall be perfected by docketing the case in this Court as provided in Rule 13.

men. Presumably in a case where there are a dozen defendants, Hernandez believes that a dozen jurisdictional statements must be filed. A careful reading of this Court's Rules fails to disclose such a requirement of multiple jurisdictional statements. Explicitly to the contrary is Rule 10(4), which makes all parties to the proceeding below parties to the appeal unless some parties affirmatively act to opt out. There can be no mistaking Finley and Elrod's intentions to remain in this appeal. The only genuine controversy is whether or not they have properly designated themselves as appellees supporting the position of appellants. Even if it is decided that this constitutes a misnomer, it has no effect on this Court's jurisdiction to hear their appeal.

The cases cited by Hernandez are wholly inapposite to the instant situation. *Shapiro* v. *Doe,* 396 U.S. 488 (1970) involved an appeal wherein the sole defendant-appellant failed to timely file a jurisdictional statement. That holding is of no precedential value in determining whether multiple jurisdictional statements are required in the same appeal. Plaintiffs' assertion[3] that Finley and Elrod have not appealed the lower court's decision is without basis in fact and in law. *Swarb* v. *Lennox,* 405 U.S. 191 (1972) is therefore inapposite.

Rule 15(3) allows for a single jurisdictional statement where several related cases are appealed from the same court which involved similar questions on review. To require co-defendants in the same case to do that which is not required in different cases is manifestly contrary to the intent of the rules when considered individually or in *pari materia.* The plaintiffs' Motion to Dismiss the Appeal of defendants Finley and Elrod should be denied.

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3. Hernandez Brief, p. 16, fn. 5

II.

THE THREE JUDGE DISTRICT COURT SHOULD HAVE ABSTAINED FROM HEARING THIS CASE ON THE MERITS.

It is no simple coincidence that the Supreme Court came to hear the major garnishment-type cases by way of review from state court rulings. *Snidach* v. *Family Finance Corporation,* 395 U.S. 337 (1969) came to this Court after the federal constitutional challenges had been heard in the Wisconsin County, Circuit and Supreme Courts. *Mitchell* v. *W. T. Grant,* 416 U.S. 600 (1974) was heard in the New Orleans City Court and the Supreme Court of Louisiana. It came to this Court by Writ of Certiorari to the State Supreme Court. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 95 S. Ct. 719 (1975) raised the constitutional issues before the Superior Court of Whitfield County and the Supreme Court of Georgia before this Court became involved. The maverick of the lot was *Fuentes* v. *Shevin,* 407 U.S. 67 (1972) where, as here, a three judge District Court became involved in ruling on constitutional challenges to pre-judgment replevin statutes. Justices Powell, Rehnquist, and, of course, Stevens, took no part in that decision. Mr. Justice White, the Chief Justice, and Justice Blackmun, each dissented. They did so, not on the issues raised by the merits, but for the reason that the three judge District Court should have reconsidered their actions in light of *Younger* v. *Harris,* 401 U.S. 37 (1971),[4] *Samuels* v. *Mackell,* 401 U.S. 37 (1971),

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4. *Younger* had been decided only the previous term (1971) to *Fuentes.*

Boyle v. *Landry,* 401 U.S. 77 (1971), and *Perez* v. *Ledesman,* 401 U.S. 82 (1971). *Fuentes* was, as in the instant case, a frontal attack on state civil statutes made in Federal Court. The *Fuentes* dissenters anticipated the decision in *Huffman* v. *Pursue,* 420 U.S. 592 (1975) by three years and obviously did not think that *Younger* was limited to criminal or even civil statutes in aid of a criminal law, as *Fuentes* was neither. It was strictly civil.

The well acknowledged purposes to be served by federal abstention need only be summarized as comity and federalism.[5] However, an ancillary, but no less important consideration, in a suit seeking declaratory and injunctive relief, is the necessity to adequately plead the threat of irreparable injury which is both great and immediate. *Fenner* v. *Boykin,* 271 U.S. 240 (1926) and *Younger, supra.* The complaint seeks class relief, but wholly fails to adequately plead the existence of irreparable injury which is both great and immediate.[6] The plaintiffs purport to meet this threshold requirement by asserting that the facts relative to Hernandez' illness constitute irreparable injury. This falls far short of the test. However, assuming, *arguendo,* that it is sufficient for Hernandez, those facts cannot bootstrap the plaintiff class past the threshold requirements as said facts pertain solely to plaintiff Hernandez. The plaintiff class, therefore, has failed to plead or otherwise prove any irreparable injury, much less that which is great and immediate. Class relief was, therefore, erroneously granted.

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5. See *Huffman* and *Younger,* at p. 44.

6. The complaint, p. 19, contains mere conclusory allegations.

The narrow exception to the *Younger* and *Huffman* doctrines is in the situation where the challenged statute is "flagrant and patently violative of express constitutional prohibitions in every clause, sentence and paragraph and in whatever manner and against whomever an effort might be made to appeal it.'"[7] Facial invalidity is expressly insufficient.[8] The three judge Court applied the incorrect test and found mere facial invalidity. That error alone is grounds for reversal.

The flagrantly and patently violative test assumes, *inter linea,* the impossibility of narrowing the statute by state court interpretation. Unfortunately, this Court does not have the benefit of state court decisions dealing with these constitutional challenges. The Illinois Supreme Court could hold that the hearing date on attachments[9] must be within ten (10) days. It could hold that the present period is appropriate, but that the defendant must be permitted a hearing, on motion, at any time after the attachment. The State Supreme Court could require specific factual allegations and find that filing general denials by the defendant must trigger an immediate hearing on the merits. The state court could do many things to limit or construe the statute, but this Court is left to speculate what might be done because the state courts were preemptorily denied the opportunity to do anything by the Federal District Court's actions.

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7. *Younger, supra,* at pp. 53-54.

8. *Huffman* and *Younger, supra.*

9. Ten (10) to sixty (60) days after the attachment, Ch. 11, § 6, Illinois Revised Statutes (1973).

Comparing these facts before the Court with those considerations in the case of *Mitchell* v. *W. T. Grant,* 416 U.S. 600 (1974), the Illinois Attachment Act is not constitutionally infirm or, at the very least, is not ripe for constitutional adjudication. *Snidach, supra,* involved a special type of property—wages. The Court found the leverage of the creditor on the wage-earner to be unconscionable. That condition is not present in the case at bar. The *Fuentes* and *Mitchell* cases demonstrated this Court's belief that conclusory assertions of entitlement to possession constitute an insufficient showing. The Illinois Attachment Act, however, sets forth only nine specific situations wherein a Writ of Attachment may be granted.

Judicial review of an application must be sought in tort cases but the District Court found that fact to be uncontrolling.[10] These defendants urge the position taken by Justice Powell in his concurring opinion in *North Georgia Finishing, Inc., supra,* which stated the petition need only be presented to a neutral officer, not necessarily a judicial officer, to determine a factual basis for the need to resort to the sought-after remedy. He concluded that it would be sufficient for a clerk or other officer of the court to issue the original writ.[11] Justices Blackmun and Rehnquist in their *North Georgia Finishing, Inc.* dissent agreed that "the clerk-judge distinction, relied on by the Court, surely is of little significance so long as the court officer is not an agent of the creditor." Justices Stewart, Douglas and Marshall in their *Mitchell* dissent, also felt

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10. The District Court declared even those sections requiring judicial review to be unconstitutional.

11. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* concurring opinion, Justice Powell, fn. 3.

that the fact that the official who signs the ex parte application is a judge instead of a court clerk, is of no constitutional significance. They correctly pointed out that he can do no more than ascertain the formal sufficiency of the allegations and that the act of issuing the writ thereafter becomes ministerial.

The necessity in Illinois, or lack thereof, for pleading specific facts demonstrating the right to possession is unknown to this Court, as the Illinois Supreme Court has been precluded from making that determination. As in *Mitchell,* a bond is required to be filed by the plaintiff in Illinois, the defendants' costs are awarded pursuant to Section 27 for a wrongful attachment, and Section 30 of the Act allows the defendant to file a counter-claim for damages. The Sheriff maintains possession of the attached property and pending disposition pursuant to Section 14, and the garnishee maintains control of funds pursuant to Section 21.

The necessity of protecting creditors of easily wasted property is amply explained in the *Mitchell* opinion. There is no asset anywhere to be found which is easier to convert, waste or secrete than cash. Requiring notice to be given prior to seizure in such a circumstance as this would be the height of folly. The money could be easily withdrawn and spent, or hidden. In cases involving purported indigence, the funds would be forever lost to the creditor.

III.

THE STATUTORY PROCEDURES PROVIDED IN THE ILLINOIS ATTACHMENT ACT, ILL. REV. STAT., 1973, CH. 11, AFFORD THESE PLAINTIFFS DUE PROCESS OF LAW.

The defendants Finley and Elrod adopt by reference the arguments made by defendants Trainor and O'Malley concerning the constitutionality of the Illinois Attachment Act and adopt those arguments as their own.

CONCLUSION

The defendants Finley and Elrod have properly preserved all issues raised on appeal for their appeal. They timely filed their notice of appeal and are parties to this appeal under this Court's Rules. There is no requirement in any court rule or decision which mandates that these defendants file a duplicative jurisdictional statement. Their appeal was perfected when the case was docketed. Plaintiffs' motion to dismiss their appeal should be denied.

The plaintiff class has never asserted a single fact in support of its purported irreparable injuries. This Court is left to speculate what they might be. The rule of equity is that this case should have been dismissed pursuant to *Fenner* v. *Boykin, supra.* Failing that, the District Court should have abstained from hearing this controversy pending a resolution in State Court of the constitutional issues. Those issues might well become moot, or resolved, to the satisfaction of the plaintiff, thereby saving the District Court from making unnecessary rulings on matters which are of special state concern. It would also have

made it unnecessary to interfere with lawfully enacted State statutes. Comity and Federalism were ill-served in this case. The sole conclusion to be drawn from the District Court's actions is that it considered itself better suited than the Illinois State Courts to protect the constitutional rights of the citizens of Illinois. That determination was unwarranted and should be rejected by this Court with an opinion and order reversing the District Court.

Respectfully submitted,

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